applicants canceled their applications. Adverse processing activity on the part of MetLife is evidence of retaliation against Petitioner. Petitioner's processing reports show that her business averaged five to six weeks to process. Petitioner provided a sworn affidavit from applicants with a female head of household attesting to their unexplainable delay.

Petitioner's first written application was a $300,000 whole life insurance plan to a young female married parent who was the primary support for her family. This would have been a good beginning for Petitioner, establishing high expectations. However, the applicant cancelled this plan and provided a sworn affidavit that this was in large part a result of the behavior of Petitioner's manager at the appointment. Petitioner claims that the lack of female mentors and managers diminished her business opportunities.

Immediately following her complaint memo regarding sexual and non-sexual harassment, Respondent declined a $100,000 face amount whole life insurance plan written by Petitioner for a middle-aged married female parent who was fully employed as a high school teacher and according to her personal physician in good health. Consequently, Petitioner lost a sizeable commission and referral business. Respondent claims they cannot locate the records for this declined application and has not produced requested information on this decline even after Petitioner provided the requested receipt regarding the deposit date to enable them to locate this evidence.

Petitioner received recognition in the Silver Spring office for having the highest sales for disability income plans with one written application for a female client. When she wrote another for a male client, who along with his wife had previously applied through Petitioner and been approved for life insurance, this plan was declined without explanation to the Petitioner or the applicant.

For quarter end November 18, 1996, when Petitioner did not meet the minimum validation requirement, was subject to termination and received an offer for extension, she again had sufficient business pending to meet this requirement. However, again this business was not timely processed. Petitioner's Summary Reports show the placing of this business the very next week after her quarter end. MetLife has never explained why the underwriters who processed this business and who assured Petitioner that it would process in time for her quarter end failed to do so. Her income statements show that her income at this time does not support the explanation in the extension letter that the Court interprets as justifying this action. In fact, as Petitioner's income declined, she never received any notice from MetLife that her compensation was being adjusted "in this manner." See Appendix E, p. 46a. Why was it delayed? Why was her request for a commission setback denied? Petitioner claims discrimination and retaliation.

Petitioner was compensated pursuant to "MetLife's Compensation Payable to Account Representatives Appointed August 1, 1994 and Later Under the Financing Plan" whereby account representatives meet quarterly production requirements to maintain their employment. Petitioner has shown how this compensation plan is a policy that allows disparate treatment of MetLife employee's. While account representatives must "place" a certain dollar amount of business on an exact day at the end of each quarter, there is no exact requirement for the MetLife employees who process this business. Therefore, the deciding factor as to whether an account representative maintains their income and employment is not dependent on their sales or **"production"**, but on MetLife's **"processing"** of that business.

Petitioner was told that the duration of time for the processing of an account representative's business is ordinarily two to three weeks and the delays in her applications were extraordinary. A longer time period is unusual. Most of Petitioner's sales took a longer time to process. This delayed processing is evidence of discrimination and retaliation for Petitioner's complaints.

> "Simple arithmetic will prove that the length of time from the writing to the placing of an application or the time at which the account representative is credited with the commission income, determines the account representative's earnings. A change in this one factor guarantees a change in the other. Over a 12 month period, holding all other factors equal, i.e., the value of the policy and the rate of the commission, if one application is written each month but the placing time varies from 2 to 4 to 6 weeks in time, at the end of the year the account representatives' earnings will vary by the commissions from 11 to 8 to 6 applications. Delayed placing and commissions result in an immediate lowering of income from sales and during the initial training period, the loss of training allowance income and the threat of termination. Speedy placing allows for greater earnings and increases the expectations of management regarding the account representative's earnings potential and results in higher IPLs and bonuses.

Data by gender on the time interval from the date the applicant signs the policy application to the commission credit date to the account representative, including the application processing date and the policy issue date, for the account representatives who worked in the same offices as Petitioner during the time she was employed by MetLife, will prove Petitioner's claim that Respondent's compensation rules and schedules are a barrier to equal employment for women at MetLife. Gender discrimination is evident in the number of female account representatives hired, the number who completes the initial training period, the length of their employment and in career and retirement earnings of women. The validation policy for retaining career account representatives is a compensation policy that results in gender discrimination in employment at MetLife. This formula appears neutral but has an adverse impact on women. When combined with other barriers, such as harassment and retaliation, it is an insurmountable obstacle. The invisibility of such invidious barriers makes change difficult and prevents equal employment opportunity for women.

Barriers to equal employment opportunity include socialization and educational and employment practices that prohibit access and full participation on the basis of gender. In a workplace, these barriers constantly interact and reinforce each other. When acting together, the obstacles created become insurmountable.

> Discrimination in the handling of business occurs because the model of a successful account representative at MetLife is a masculine one. All members of the Hall of Fame are men and most awards and promotions go to men. In Petitioner's work environment, the managers are all men. At best, the processing of the work of female account representatives receives a lower priority. The validation policy, a seemingly neutral policy, becomes a barrier that invidiously takes note of gender. Women suffer discrimination of the type Title VII forbids.[2]

Documents provided by Respondent in discovery show that the gender of account representatives is more than 80% male. Given Petitioner's processing experience and the lower percentage of women account representatives, a comparison of the time it takes to process the business of account representatives at MetLife by gender would show that the time from the writing of business to the credit of commission is longer than the usual for women overall. This is disparate treatment which results in significantly lower earnings and lower career expectations for women at MetLife. The Court, however, refused to order Respondent to respond to Interrogatory No. 16 regarding the processing time by gender of the account representatives identified by Respondent in discovery. Petitioner's complaint was dismissed by the Court for lack of sufficient evidence.

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[2] Plaintiff's Letter to the Court dated December 20, 2000 to further support her Interrogatory and Document Requests and obtain an Order to provide this evidence to her complaint.

This is a matter that has been brought to the Court by other female account representatives at MetLife. *See Janet Metcalf and Charlene C. Davis v. Metropolitan Life*, 961 F. Supp. 1536 (D.Utah 1977). Here the Petitioner was put on leave while her harassment investigation was conducted, told she " ... would pick up where she left off when she returned to work" and then criticized for her lack of performance during the leave. During her leave, "because she stopped selling insurance, her income was reduced by about $400.00 per month." Metcalf argues this was an instance of retaliation because she could not properly do her work without going to the office. Metcalf also argues that "MetLife's demand that she place the same amount of insurance that she would have placed were she not on leave was not only unreasonable because of her above concerns, but also because she understood that she would have no work-related responsibilities during her leave." *See Metcalf* 1539, fn 2. In fact, by putting her on leave, MetLife prevented her from generating business. MetLife, thereby, thwarted her ability to validate and caused her a loss of income that she could never regain.

The validation policy results in disparate treatment at MetLife. This policy is used to choose men over women as career account representatives. Only three women of the 70 account representatives identified by MetLife to have worked in the offices Petitioner worked in were still employed by MetLife on September 19, 2000, the date of "Respondent's Supplemental Responses to Petitioner's Interrogatories." This is evidence of gender discrimination.

When Petitioner did not meet the validation requirement in November 1996, knowing her business should have processed in time to meet the requirement, she accepted the offer of extension believing it was made in good faith. She immediately applied for the setback of these commissions to allow for an increase in her income. MetLife's letter to Petitioner See APPENDIX E, p. 46a, regarding the extension of her validation supported a setback. "You can take steps to avoid reaching the contract year financing limit and the resulting compensation reduction by increasing your non-financed AR compensation. The way to do this is to increase your First Year Commission (FYC) production to your moving average account..." Her non-financed compensation would have been increased by these sales commissions and additional non-finance earnings would have immediately gone into her account. This would have reflected well on her and the Wheaton Office. However, her request for a commission setback of the delayed business was denied. This continued reduction of her income is evidence of continued violation.

The following quarter, due to managerial and staff support, extra effort and personal expense to Petitioner, including an outside sales workshop, she validated and gained back her full $500 weekly IPL. However, the office in Wheaton was closed in spite of a petition to keep it open and Petitioner was again transferred from the Elite to the American Office. This transfer involved a move to a fourth location, was again disruptive to Petitioner's office environment and was another setback on the part of MetLife to impede her success. By this time, the reduction in income made it impossible for Petitioner to maintain her lease obligation and she moved into a room sharing situation, which disallowed conducting business from her home. The work environment was such that Petitioner could not possibly function as an account representative. It amounted to a continued barrage of adverse employment actions that were insurmountable for Petitioner.

When she did not meet the validation requirement in the next quarter, her employment was terminated. Believing that success as an account representative was not possible for her, she did not appeal this decision and proceeded with legal action.

MetLife purposely hired Petitioner at a lowered initial income, discouraged her from writing high face value policies that would earn her higher commissions, declined applications for no justifiable reason and delayed the processing of Petitioner's business causing cancellations and delays in commission credits to her. This was to cause her to suffer reduced income, from the loss of sales commission and the loss of financed income beyond her sales commissions, and quit her employment. Upon termination, Petitioner's clients and residual income from her sales become the property of MetLife. Further, voluntarily quitting her employment would have avoided MetLife having to document their findings regarding her complaint and give a valid reason for their discriminatory policies that they assert justified her termination.

Petitioner made every effort to maintain her employment. This includes making two formal complaints of sexual and non-sexual harassment to MetLife management and retaining legal representation. MetLife asserts they carried out an investigation into these complaints but saw no need to include her or her attorney. Petitioner believes the sexual harassment was itself retaliation for earlier complaints regarding the processing of her business and could have provided more extensive information to support her complaints. Her legal representative, Mindy Farber, contacted MetLife by letter and telephone and they refused to respond to Ms. Farber regarding their investigation. MetLife reported to Petitioner that the investigation file was "lost". Respondent has never provided any documentation to support their findings regarding the in-house investigation or to justify their discriminatory policies.

II. Proceedings Below

Following complaints with the Maryland Human Rights Commission and the Equal Employment Opportunity Commission in 1997, who issued Petitioner a right to sue letter, a Complaint was filed Pro Se by Petitioner on May 4, 1999 at the United States District Court, Eastern District of New York.

Petitioner had no income following her termination. Her position as an account representative with MetLife was excluded from unemployment compensation. Unable to pay the debt she had incurred while trying to maintain her living situation as her income as an account representative at MetLife declined, she lost her good credit standing and her credit accounts were all closed. She managed to find employment as an office temporary and retain an attorney to file her Complaint with the Baltimore Maryland office of the EEOC on April 16, 1998.

She moved to New York City, where she was able to live with family until she could become employed as a patent and trademark secretary, the job she had successfully held prior to her employment as an account representative. Petitioner is not an attorney, but she was given advice by the attorneys she contacted to represent her. Unfortunately, the amount required to retain an attorney for this court action was thousand of dollars and beyond her means. Her requests to the Court for appointment of legal counsel have been denied. Having a regular income and informal advice from attorneys enabled her to file her Complaint pro se. Petitioner would like to acknowledge the Judges and attorneys who made it possible for her to muddle through this civil action.

A Memorandum and Order filed November 10, 1999 was issued by Chief Judge Sifton of the United States District Court of New York which in part denied and in part granted Respondent's Motion to Dismiss. Judge Sifton greatly assisted Petitioner by clearly articulating her Complaint. He concluded that she failed to allege sufficiently severe or

pervasive incidents to state a hostile work environment. However, he recognized that she honestly believed her complaint was grievous enough to bring before the court and that she suffered an irreparable loss of a career. The court granted Petitioner leave to submit an Amended Complaint that was filed by Petitioner on November 30, 1999 at the United States District Court, Eastern District of New York.

A Memorandum and Order filed on April 19, 2000 was issued by Senior Judge Sifton granting Respondent's Motion to Dismiss but denying the Motion to Strike. Maryland state law claims were dismissed because although Maryland Law prohibits discrimination it does not provide for a private right of action. The complaint against Harry Kamen was dismissed because the claims were held to be insufficient as a matter of law. Petitioner's sexual harassment complaints were again dismissed with prejudice. Because the court found Petitioner's Amended Complaint sufficient under the federal rules, Respondent's Motion to Strike was denied.

The terrorist attack against the World Trade Center in New York City on September 11, 2001, made it impossible for Petitioner to commute to her employment. She attempted other means of transportation, including walking from the Staten Island Ferry, through ground zero, to 46th Street, for approximately six months. However, when this began to effect her physical and emotional well being, she applied for employment in New Mexico, was hired and moved to Albuquerque. Unfortunately, she lost this employment because of a lack of work. Unable to find regular employment in New Mexico or California, she moved back to the District of Columbia in 2003 and has since been able to be employed as an office temporary. This employment and temporary residence at the home an acquaintance of her sister has allowed her to continue with this action.

The Appendix to this Petition provides the text of the Memorandum and Order that was issued by District Judge Dearie. An Appeal was filed on April 29, 2004. The Appendix to this Petition provides the text of the Summary Order and the Order denying Petitioner's Request for Rehearing of the Appeal.

It has been almost ten years since Petitioner first contacted the Montgomery County Human Rights Commission in 1996 and she continues to muddle through reading court decisions and orders, attempting to interpret legal cases, preparing answers to the court and providing discovery information to Respondent. She has been typing since she was a young child and has been able to prepare and format documents herself.

The fact that as a pro se plaintiff she has been able to bring this matter to the Supreme Court attests to the freedoms that exist in the United States of America. She truly still believes that her individual complaint is grievous, that she has submitted sufficient evidence to support her complaint and that requiring Respondent to recognize the discriminatory aspects of their personnel policies and restructure these policies is in the best interest of all people in this country. The efficient and fair allocation of resources insures that the basic principles that our country was founded on will remain strong and true to their original intent.

REASONS FOR GRANTING THE PETITION

Review by this Court of the Court of Appeals decision is compelling and of exceptional importance because:

I. The health and well being of the United States of America depends on the full contribution of all the people. Gender discrimination disallows full participation. When market mechanisms do not eliminate discrimination the only remedy is the law.

The Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment based upon sex. As population grows geometrically, women from economic necessity are entering the labor force where they are subject to a hostile, abusive environment that subordinates them to secondary employment opportunities and earnings.

As more and more women are entering the workforce they are challenging their exclusion from traditionally male jobs and unequal earnings. The Civil Rights Act has been followed by thousands of formal complaints a fraction of which get to court.

A recent study was made of every reported federal and appellate court opinion on sexual harassment in the workplace from 1986 to 1996 – a total of nearly 650 cases. "Although widespread sexual harassment has existed for decades, and litigation has proceeded for over twenty years, detailed knowledge about these issues is still lacking." *See* Ann Juliano & Stewart K. Schwab, Stewart J. *The Sweep of Sexual Harassment Cases*, 86 Cornell L. Rev. (2000-2001), p. 548.

This study found that 94.6% of the Petitioners were women and only 11% were still employed at the time of the lawsuit. A disproportionate number of Petitioners are blue collar or clerical workers. Blue collar represented 56.7% and white collar represented 4.2% of District Court opinions. On the appellate level, this was 32.9% to 2.4%. Win rates, when a favorable opinion is written, were close in range. *See Juliano & Schwab*, Appendix A. Women filing suit, even with win rates, are still unemployed. In addition to the loss of their earnings, women are incurring the costs of a civil action with little benefit to them individually and as a group.

In spite of federal legislation and growing case law, employers continue to discriminate. According to the 2000 census, more women in the United States are entering the workforce than ever before and are more likely to have continuous lifetime work experience. There was a remarkable increase in mothers. Despite unprecedented

change, the overall labor market remains sharply segregated by sex. Women remain in a secondary economic status. Single-parent female householders have the highest poverty rate in the United States. This not only devalues their status in the workplace, but their status as mothers. Women lose custody of their children because of lack of income.

Few statistics about women in the U.S. reveal as much about their place in society as income. Census data showed the median income in 1997 of persons 15 years of age and over was $26,115 for white males and $13,792 for white females. For black males, median income was $18,096 and $13,048 for black females. *See* U.S. Census Bureau, *The Official Statistics*, July 27, 1998, Table C-2.

While the discrepancy is still wide, for working women, the situation improves. In 1997, the median wage or salary income for all races by gender was $26,939 for men and $16,849 for women. *See Census* Table C-6.

Wage discrimination is paying equally productive workers different wages on the basis of considerations not related to productivity.

The pervasive requirement to the court asks whether the harassment was sufficient, severe and detrimentally encompassing to modify the working environment and significantly effect their employment. The actual numbers presented by the U.S. Department of Labor and the U.S. Census Bureau speaks to this. Women are still excluded from traditionally male dominated industries and have secondary earnings potential. Employers discriminate. Harassment combined with formal policies and procedures support existing stereotypes by creating intolerable work environments that exclude women. "By basing their decisions on .... measurable characteristics of a group, employers may give systematic preference to one group over another." *See* Suzanne Schmitz, Race and Gender Discrimination Across Urban Labor Markets, Garland Publishing, 1996, p. 7.

Scholarly studies follow different approaches to this problem. "Statistics are the ultimate honesty test." What happens every day, all the time is measured in census statistics. At best, median income and earnings data suggest discrimination. "...all of these wage dynamics are driven by employer's exclusion of women from particular jobs. If employers did not create occupational sex-typing ...there would be no ... theory.... To the extent to which market forces can eliminate occupational sex-typing...the economic gap between men and women can be made to go away." *See Schmitz*, pp. 2, 138.

The organizational culture at MetLife maintains polices that are purportedly gender neutral when these policies in fact discriminate against women as a group. Male account representatives maintain their higher earnings by selling primarily to men whose greater incomes justify larger face amount plans and thereby result in larger commissions. Because business plans are organized around "target" markets or "natural" markets, they block access by women to higher earning clients. This marketing mechanism lowers the earnings of female account representatives. It maintains wage discrimination.

The more important issue for the court is not the severity of the discriminatory action or behavior that causes the suit, but the harm that is done to the woman. "I argue that sexual harassment should be understood as a practice that preserves male control or entrenches masculine norms in the specific setting of the workplace." *See* Kathryn Abrams, "The New Jurisprudence of Sexual Harassment", 83 Cornell L. Rev. (1998), p. 1172.

Stereotypes play a significant role in the nature of the harassment. Research shows that women entering male dominated jobs suffer less sexual harassment than do women in traditionally female jobs. *See Schmitz*, p. 565.

While sexual misconduct is a serious violation, it is unfortunate that the "Petitioners alleging sexual harassment based on comments or behavior of a sexual nature are more

successful that Petitioners basing their claims on nonsexual … behavior." *See* Schmitz, p. 555.

The sexual or non-sexual nature of the harassment should not be the pivotal issue. The issue is that employers discriminate against women in the workplace that this creates earnings disparities and excludes women from jobs in traditionally male dominated industries, in this case financial services.

Women have always worked. In 1997 women represented 96.8% of child care and household workers. Waitresses and waiters were 77.8% women. 83.9 of elementary school teachers were women. *See*, U.S. Department of Labor, Employment and Earnings, 1998, Table 5.1, *Earnings in Selected Occupations: 1997.* However, when they attempt to enter jobs that have traditionally been held by men they face resistance and hostility from employers, workers and by others "anxious about what growing numbers mean for male control within the workforce and for women's roles outside it." See *Abrams*, p. 1196.

The Courts have stated "The broad overriding interest, shared by employer, employee and consumer is efficient and trustworthy workmanship assured through fair and … neutral employment and personnel decisions. *See Texas Department of Community Affairs. V. Burdine*, 450 US 248, 259.

The Supreme Court granted a Writ of Certorari in *Griggs et al v. Duke Power Company*, 401 US 424 (1971) to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, to maintain a standard for hiring when it was not significantly related to job performance, when it disqualified a protected group at a higher rate and when the jobs in question formerly had shown a longstanding practice of protection to one group.

Employment discrimination effects the physical and mental well being of women to the detriment of civilization. Since 1980, the United States has been experiencing an

increase in the male/female sex ratio, a statistic that is projected to continue through the century. "The sex ratio (males per 100 females) declined every decade from 1910 to 1980, then increased in the 1980s and 1990s. *See* Hobbs, Frank and Nicole Stoops, U.S. Census Bureau, *Census 2000 Special Reports, Series CENSR-4, Demographic Trends in the 20th Century*, U.S. Government Printing Office, Washington, D.C., 2002.

MetLife, experiencing financial difficulties as a mutual company, changed to a publicly traded corporation during the time of Petitioner's employ. Rather than recognize that they discriminate and look into the financial impact of their policies, to the detriment of their own earnings as an employer they hide behind a pretext and a smoke screen of reams of complex "regulations" which support a male dominated workforce. The economic status of women impacts the economy overall. When women as a group are not being fairly employed and compensated and contributing as investors, insufficient resources go into needed investment and services and this negatively effects the growth of our gross national product which is so desperately needed as our population grows.

The courts must focus on outcomes. In a free enterprise, we allow government intervention and regulation when there is a compelling reason that protects the common good. When data shows gross discrepancies in earnings and number of women employed, employers have a responsibility under federal law to restructure their policies and "validate" all groups. The Court must impose this responsibility on Respondent.

II. This is a Case that shows Institutionalized Systemic Discrimination by an Employer. It Explains Why Employment Discrimination Persists in the Labor Market.

On an individual basis, Petitioner was subjected to sexual and non-sexual harassment, retaliation and gender discrimination. This hostile work environment, combined with seemingly neutral formal policies and procedures that invidiously take note of gender, amounted to an insurmountable obstacle that served to undermine Petitioner's competence as an account representative blocking her from the job of account representative and a rewarding career in financial services. As a group, women account representatives at Metropolitan Life Insurance Company suffer significantly lower earnings and career expectations than men.

A policy such as the initial cap MetLife places on its IPL for account representatives maintains the high male-female income disparity. MetLife's policy that disallows initial earnings higher than the applicant's pre-hire earnings discriminates against women who have significantly lower earnings in the labor market overall. In 1997, men's earnings exceeded women's in every occupation, even those where women predominate. The median weekly earnings of female elementary schools teachers was $655 compared to $719 for men. *See,* U.S. Department of Labor, Table 5.1.

Historically, MetLife's account representative are predominantly male and the earnings at the time of Petitioner's employment for males was 350-400% that of females. All members of MetLife's Hall of Fame are males. If there is to be a good faith discussion regarding gender discrimination, it has to be done with facts.

According to the U.S. Census Bureau, Current Population Survey, March 2002, Total Money Earnings of Full-Time, Year-Round Workers by Sex 2001, 49.1 % of females earn less than $24,999 compared to 24.5 % of males. 5.5% of female earnings were $75,000 or over compared to 15.8 % of males. Differentials by race would show a greater disparity for white females given the considerably lower earnings of black men. *See* Reneé E. Spraggens, *Women and*

Men in the United States: March 2002, Population Characteristics, U.S. Census Bureau, March 2003, p4.

Women at MetLife, because of the policy that caps initial earnings at pre-hire earnings, begin their careers at earnings lower then men. MetLife would have to make a significant recruitment effort to find women with earnings that would be fair given the cap. This is a handicap that is impossible to overcome. They will never make up this loss in earnings. It diminishes the career earnings of women and maintains wage discrimination. This is exactly what Title VII prohibits. "Gender discrimination is caused by employers and costs them money. When the market does not eliminate discrimination the only remedy is the law." *See* Samuel Cohn, Race and Gender Discrimination at Work, Westview Press, 2000, p. 170.

MetLife justifies its financing plan for account representatives as being neutral because it applies equally to all and conforms to the regulations set forth by the New York Insurance Department. In fact, the validation requirement depends on the timely processing of the account representatives business and is easily manipulated to maintain a white male workforce. In Petitioner's case, she was terminated simply by delaying the processing of one application for one week beyond the validation date.

When Petitioner requested a setback of the commission from the delayed placing of her applications at the time of her first termination, based on a formal policy in the "Compensation Manual," it was denied. MetLife's letter granting an extension of her validation, *see* APPENDIX E, p. 45b, states "You can take steps to avoid reaching the contract year financing limit and the resulting compensation reduction by increasing your non-financed AR compensation ...". She took this step and her request was denied.

This is a matter that has been brought to the Court by other female account representatives at MetLife. *See Metcalf.* Here the Petitioner was put on leave while her harassment investigation was conducted and then criticized

for her lack of performance during the leave. MetLife's actions may appear to be an effort to accommodate Ms. Metcalf by an in-house investigation. In fact, because of her complaint, they damaged her business activity and reduced her income.

Petitioner's income began to decline immediately following her formal complaint. She calculated her own processing time given her records and clearly could perform this analysis on other account representatives. The District Court, however, ruled that "... in the absence of showing that the information requested could provide the basis for a defensible statistical analysis tending to indicate discriminatory intent, production of information requested with respect to accounts representatives other than [Plaintiff] is burdensome and is not reasonably calculated to lead to admissible evidence."

Simple arithmetic shows the inequality of MetLife's financing plan. This is a policy that disqualifies a protected group at a higher rate. As a group, women at MetLife suffer significantly lower earnings and career expectations because of this requirement that invidiously takes note of gender. The invisibility of this barrier makes change difficult and prevents equal employment opportunity for women.

The usefulness of statistics depends on the surrounding facts and circumstances. Analysis in the social sciences is a tool that is subject to the interpretation of the analyst. Petitioner is not an attorney. She has read numerous cases relating to sexual harassment. Interpreting data and interpreting judge's words is at best subjective analysis. Apparent is that the courts fail to recognize the harm done by harassment aimed at women and are only beginning to acknowledge harassment that is not explicitly sexual or physically aggressive nonconsensual behavior.

Courts must begin to focus on the intent of Title VII. "The Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously

to discriminate..." *See Griggs v. Duke Power Co.*, 401 U.S. 424.

III. Summary Judgment should not have been granted.

Petitioner's complaint was timely filed and she suffered harassment, a continuing violation of retaliation and adverse employment action.

The court found "Since there is evidence to suggest that plaintiff had notice that she had grounds for legal action as early as 1995 and that she voluntarily delayed filing until November 1997, one year and ten months after she had notice that MetLife's internal investigation had been completed, this Court finds no ground for granting plaintiff a waiver of the time ~~bar~~." *See* APPENDIX C, p. 23-24a. Petitioner's intent was to maintain her employment and income. She was not making decisions anticipating a court action. She had contacted the Montgomery Country Human Rights Commission and sought legal advise in 1996. In early 1997, an attorney, James King, advised her not to be proactive. At the time of the in-house investigation, she had retained an attorney, Mindy Farber, and was making every effort to find an amicable solution. She has submitted in this Petition research that only 11% of plaintiff's in sexual harassment cases are still employed at the time they file suit. Her goal was to be successful in her career by developing and maintaining long-term client relationships. Dismissal on the basis of timeliness is wrong.

In *Metcalf,* Charlene Davis avoided termination by quitting her employment at MetLife and resuming her career as an account representative with another financial services company. The court ruled that this was not constructive discharge in that "...a reasonable person would have allowed more time to see if MetLife's remedial actions improved the situation and would not have felt compelled to resign."

The facts that Petitioner has brought before the Court support that her termination was a result of harassment, sexual and non-sexual, that impeded her ability to perform her duties as an account representative, diminished her commission earnings and caused her concern for her personal property and physical well being. This environment combined with policies and procedures at MetLife, including a cap on initial earnings at earnings at the time of hire, delays in the processing of her business and unwarranted declines of written applications, were insurmountable barriers to successful employment which she endured up to her termination. As a result, Petitioner has suffered a loss in earnings and assets, loss of her good credit rating, termination of her employment and loss of a career.

The information provided by "Respondent's Second Set of Supplemental Responses to Petitioner's First Set of Interrogatories" regarding the earnings of account representatives who were employed in the same offices as Petitioner shows that the commission earnings of men are at least 350% the earnings of women. From January 1995 through January 1998, the six highest annual earnings for men were $195,543.36, $179,827.64, $105,323.70, $104,462.19, $75,648.80 and $66,604.43, respectively. For women, the six highest annual earnings were $55,389.37, $42,763,13, $37,311.53, $32,178.01, $26,740.59 and $24,224.04, respectively. It is interesting that the highest earning female earned less that the lowest earning male. In addition, while all but the lowest of six high male earners were still employed by MetLife only the two highest of the female high earners remained an account representative at MetLife. Three of these women were only employed for less than two years. Petitioner's termination left one. Clearly there was no intent to train these top-producing women for career positions. This is evidence of gender discrimination at MetLife and presents a genuine issue of material fact.

In their Motion for Summary Judgment, Respondent bears the burden of proving that the adverse employment action and harassment that Petitioner endured were not retaliation and that MetLife's policies and procedures do not discriminate by gender. Respondent must show evidence that Petitioner's difficulties in getting her business approved and placed in a timely manner were not related to her complaint or gender. Respondent bears the burden of explaining why men earn more than 350% that of women who are performing the same job. Respondent must provide evidence as to why women account representative cannot be successful in retaining their employment to retirement.

The court's decision was made on an incorrect analysis of the information provided.

With regard to the earnings differential for male and female account representatives, the court stated, "Plaintiff's own calculations, however, are questionable at best. Her '400%' figure is derived from a comparison of the annual earnings of the highest earning male from January 1995 to January 1998 ($195,543.36) to the annual earnings of the highest earning female from the same period ($55,389.37)... While the earnings of the highest earning male earner could reasonably be called approximately 3.5 times (or arguably 350%) those of the highest female earner, to extrapolate from that figure to say that the earnings of all male account representatives are 400% those of all female account representatives is clearly spurious. Moreover, these calculations tell us nothing about statistical significance of the disparity or the range of other variables that might contribute to the observed disparity, such as hours worked, prior experience, years of service, volume of business, value of policies sold or the like. Plaintiff's comparative analysis of male-female retention rates is similarly spotty. *See* APPENDIX C, p. 32a.

Plaintiff's analysis was correctly calculated on a "financial" calculator that is programmed to round at 5 to the next highest number. Therefore, anything over 350% would round to 400%. This recognizes the social science analysis of economics. In this instance, the best statistic is the total amount. Clearly, this disparity shows discrimination—secondary earnings on the part of women. What causes this discrimination is a subjective analysis on the part of the researcher. If the researcher were knowledgeable of the value of employee benefits, they would recognize that this percentage could easily be doubled to account for the dollar benefit to the employee of life, health and disability insurance, employer retirement contributions, leave time, etc.

Sexual harassment disadvantages women in the workforce. If the action or behavior is directed equally toward all in the group, but adversely effects women this is sexual harassment. While much of the harassment to Petitioner was related to an office environment that all were subjected to, i.e. difficulties with support, poor security, an office burglary where application deposits were lost, and being admonished for not being on time for evening telephone sessions (a demand which was contrary to formal policy regarding work hours), the fact is that the effect was more adverse to Petitioner and other women in the office.

With regard to Petitioner's claim that the extension granted to her was a pretext to mask retaliation and gender discrimination on the part of MetLife, the court erroneously states "...the evidence she points to in support of this charge, namely that MetLife did not grant her the requested setback of her unprocessed business and that her income declined as a result does not support this conclusion. Plaintiff points to nothing in MetLife's Compensation policies that supports her argument that compensation setbacks ought to have been granted to someone in her situation – indeed there is no mention of 'compensation setbacks' anywhere in the policies." See Appendix C, p. 26a, fn. 6. In fact, this is a formal policy that was submitted by Petitioner as Attachment

I to her Memorandum of Law in Opposition to Respondent's Motion to Dismiss. See Appendix D, p. 43a. Petitioner's claim is valid.

The court's demand for information was excessive and wrong in deciding that Petitioner had insufficient evidence and in refusing Petitioner information that would allow her to comply with the evidence they deemed sufficient.

Appendix D is the list of attachments to the Petitioner's Appeal Brief. It outlines the information and evidence that Petitioner submitted to the court to support her complaint. This includes seven affidavits, six sworn at the time of the filing and one unsworn that was later submitted as a notarized copy. Plaintiff herself submitted two sworn affidavits, one in 2002. Yet, the court states this is insufficient and errs in stating that "even more significantly, plaintiff has provided no sworn affidavits from herself attesting that the allegations in her complaint are true." *See* Appendix C, p. 16-17a.

Petitioner believes that to expect a pro se Petitioner to provide more than has been provided in unreasonable.

However, Petitioner would have attempted to meet the court's demands for additional information, in particular she would have compared the processing time on the other account representatives in her offices by gender, but this data was not provided to her.

Petitioner's complaint and evidence is supported by the fact that at least two other court actions claiming discrimination have been filed against Respondent during the time of Petitioner's complaint. The record of the United States District Court Central Division Utah case of plaintiff's Janet Metcalf and Charlene Davis, account representative's in MetLife's office in Utah, presents a hostile environment that combined with discriminatory policies and procedures to discriminate similar to that described in Petitioner's

complaint.[3] The Court cited another case, *Madera v. Metropolitan Life Insurance*, No. 99 CIV. 4005, 2002 WL 1453827, *4 (S.D.N.Y. July 3, 2002) (holding that equitable tolling is inappropriate where plaintiff, aware of the adverse conduct, delayed filing a complaint hoping Respondent-employer "would turn from its discriminatory and retaliatory ways."). *See* Appendix C, p. 22-23a. Petitioner was not able to read the record of this unpublished case, but believes that it also supports her complaint. All three cases make evident that MetLife's formal policies and procedures are a myriad of regulations that serve no necessary purpose and can be manipulated to control the hiring, retention and earnings of their account representatives. Data shows that MetLife has significantly high disparities in the number and earnings of their account representatives by gender.

Respondent is hiding behind a myriad of formal policies and procedures in justifying the exclusion of women from the position of account representative. In Petitioner's case this information was withheld, i.e. the Compensation Manual, until she complained about not having one. The manuals themselves would take a mathematician and an attorney to interpret. The court itself has misconstrued these policies. This case reports institutionalized systemic discrimination by an employer.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,
/s/ Joan Tunny
Petitioner, Pro Se

Dated: 7/10/2005

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[3] *Metcalf v. Metropolitan Life, Inc.*, 961 F.Supp. 1536 (D.Utah 1997).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
[Filed April 13, 2005]

Date:	3/29/05
Docket No.:	03-7450-cv
Short Title:	Tunny v. Metropolitan Life In
DC Docket Number:	99-cv-2531
DC:	EDNY (BROOKLYN)
DC Judge:	Honorable Raymond Dearie

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 13 day of April two thousand five.

Present:

Hon. Thomas J. Meskill,
Hon. Joseph M.McLaughlin,
Hon. Barrington D. Parker,

CIRCUIT JUDGES,

Tunny v. Metropolitan Life Ins.

A petition for panel rehearing having been filed by
Joan Tunny
Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/ [Illegible]
Motion Staff Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
[Filed September 27, 2004]

SUMMARY ORDER
No. 03-7450

THIS SUMMARY ORDER WILL NOT BE PUBLSIHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 27th day of September, two thousand and four.

PRESENT:

HON. THOMAS J. MESKILL,
HON. JOSEPH M. MCLAUGHLIN,
HON. BARRINGTON D. PARKER,
Circuit Judges

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JOAN TUNNY,

Plaintiff-Appellant,

-v.-

HARRY KAMEN, Chairman, President, & CEO,
Defendant,

METROPOLITAN LIFE INS. CO.
Defendant-Appellee.

APPEARING FOR APPELLANT: JOAN TUNNY,
pro se,
Washington D.C.

APPEARING FOR APPELLEES: ANNE N. SMITH,
NEIL H. ABRAMSON,
Proskauer Rose, LLP
New York, NY.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Eastern District of New York (Dearie, *J.*), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Joan Tunny, *pro se,* appeals from an order of the United States District Court for the Eastern District of New York (Dearie, *J.*), granting defendant Metropolitan Life Insurance Company's ("MetLife") motion for summary judgment in her employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964. Familiarity with the actual and procedural history of this case is assumed.

We review an order granting summary judgment *de novo*, and ask whether the district court properly concluded that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *See Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). In determining whether there are genuine issues of material fact, we are "required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003). We will only affirm the dismissal of a claim on summary

judgment if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Id.* (alterations in original).

The District Court properly granted MetLife's motion for summary judgment. All of Tunny's claims, except for those concerning her termination, were time-barred, as they involved incidents that occurred more than 300 days prior to the filing of her complaint with the Equal Employment Opportunity Commission and did not constitute a continuing violation. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 104-05, 114-15 (2002). Tunny's discrimination claim regarding her termination fails because, even assuming that she had established a *prima facie* case of discrimination, she did not satisfy her burden of proving that MetLife's proffered reason for her termination, her failure to meet specified productivity requirements, was a pretext for discrimination. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Tunny's disparate treatment and disparate impact claims fail because she did not provide sufficient evidence to support these claims, *see Ottaviani v. State Univ. of N.Y. at New Paltz*, 875 F.2d 365, 369-70 (2d Cir. 1989) (disparate treatment). *Waisome v. Port Auth.of N.Y. & N.J.*, 948 F.2d 1370, 1375 (2d Circ. 1991) (disparate impact). Finally, Tunny's retaliation claim was properly rejected by the District Court because she failed to demonstrate a causal connection between her sexual harassment complaint and her termination. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

For the foregoing reasons, the order of the District Court is AFFIRMED.

FOR THE COURT: Roseanne B. MacKechnie, Clerk
/s/ Richard Alcantara, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed March 26, 2003]

MEMORANDUM AND ORDER
99 CV 2531 (RJD)

JOAN TUNNY,

Plaintiff,

-against-

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant.

DEARIE, District Judge.

On May 4, 1999, *pro se* plaintiff, Joan Tunny commenced this action against defendants, Metropolitan Life Insurance Company ("MetLife" or "defendant") and its then chairman, president and CEO, Harry Kamen. Plaintiff claims she was subjected to sexual harassment, gender discrimination and retaliation in violation in VII of the Civil Rights Act of 1964, 42 U.S.C.§§ 2002e et seq. By memorandum and order dated November 5, 1999, the Court dismissed all of plaintiff's Title VII claims against Kamen because Title VII provides no liability for individual defendants simply on the basis of their supervisory control

over a plaintiff. The Court also dismissed plaintiff's claims of sexual harassment against MetLife for failing to allege sufficiently severe or pervasive incidents to state a hostile work environment claim. Plaintiff was permitted, however, to file an amended complaint, which she filed on November 30, 1999. By Memorandum and Order dated April 19, 2000, the Court once again dismissed plaintiff's sexual harassment claims, this time with prejudice, and also dismissed the Maryland state law claims for lack of jurisdiction.

Defendant now seeks summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing that plaintiff's remaining claims of discrimination and retaliation are time-barred and that there is no admissible evidence showing that plaintiff's termination was motivated by gender discrimination or retaliation. This Court concludes that plaintiff has not produced sufficient admissible evidence to defeat a motion for summary judgment. Accordingly, defendant's motion is granted.

BACKGROUND

Plaintiff Tunny worked for MetLife from June 1994 until her termination in November 1997. Plaintiff first applied for a position with MetLife in 1993 at its Fairfax, Virginia office. She was not offered a job. The next year, however, plaintiff was hired at MetLife's Gaithersburg, Maryland office as a temporary special agent. Affidavit of Anne M. Smith ("Smith Aff. ___"), Ex. E (Deposition of Joan Tunny ("Tr. ___")) at 81, 91, 94. As a temporary special agent, plaintiff underwent "pre-appointment training" at the Gaithersburg office from June 1994 until February 1995, when the office closed due to corporate reorganization. Plaintiff was then transferred to MetLife's Silver Spring, Maryland office. In February 1995, having completed the pre-appointment training, plaintiff was recommended for

appointment as an account representative at MetLife by her manager, Dr. C.R. Krishnamoorthy. Her appointment was approved by the Regional Vice President, Tai Chang, on February 27, 1995.

Plaintiff remained at the Silver Spring office until it closed on December 31, 1996. Plaintiff was then transferred to MetLife's Wheaton, Maryland office until it too closed on April 13, 1997. She was finally transferred to MetLife's Rockville, Maryland office where she worked until her termination on November 21, 1997.

i. MetLife's Compensation Policies

MetLife evaluates its account representatives according to the value of the life insurance policies they sell. For each policy that they generate, account representatives are credited with a commission. MetLife has established a benchmark amount of commissions called the "validation requirement" which account representatives must meet in each of the first four quarters of employment in order to remain employed by MetLife. Def.'s Rule 56.1 Statement, ¶¶ 8-9; "MetLife Compensation Rules and Schedules," 1C(8-94), 6.14, Smith Aff., Ex. M. As the Compensation Rules explicitly state, "If the FYC [first year commission] requirement is not met at the end of any FPQ [financing plan quarter], the AR [account representative] is subject to termination." Id., *emphasis in original*. After the first year of employment, this requirement is relaxed slightly; account representatives must fail to achieve the validation requirement for two consecutive quarters before they are subject to termination. Smith Aff., Ex. N at 2.

The compensation of account representatives is also tied to the number of policies they sell and their ability to "validate". During their first year of employment, account

representatives receive a fixed weekly payment called the Initial Payment Level ("IPL") if they meet their validation requirements. Id. At 1, Def's 56.1 Statement at 9. The IPL is established for each individual account representative prior to appointment, and is based in large part on salary prior to working at MetLife. Compl. ¶ 8. If they validate, account representatives also receive weekly payments from the Quarterly Incentive Compensation Account and a training allowance beginning in the third quarter. Smith Aff., Ex. N at 1.

After the first year of employment, however, account representatives no longer automatically receive an IPL if they meet their quarterly validation requirements. Instead, they are compensated according to a formula based on their average commissions from the proceeding two quarters. Smith Aff., Ex. M; Def.'s 56.1 Statement ¶11. Specifically, account representatives are paid "1/13 of the average FYC's generated during the preceding two quarters, plus (for account representatives who validate)...[a] training allowance" on a weekly basis. Def's 56.1 Statement ¶ 11. Accordingly, an account representative's compensation after the first year may fluctuate depending on the amount of business she is able to generate, and may even dip below the IPL if she has not sold a sufficient number of policies.

ii. Plaintiff's Allegations

Plaintiff Tunny has raised a number of Title VII claims against defendant MetLife. To begin, she alleges both individual and systemic gender discrimination in her employment and compensation at MetLife. Compl. ¶ 8. She claims that MetLife intentionally delayed hiring her in order to pay her a lower Initial Payment Level, a calculation based on pre-hire earnings. Pl.'s Answer to Defendant's Motion for Summary Judgment ("Pl.'s Reply") at 2, 4-5, 13, 19.

Additionally, plaintiff alleges that she was "told [she] should write lower face amount insurance policies for [her] women clients," both an indication of how MetLife undervalues the insurance needs of its female clients and a specific attempt to discourage her from reaping the greater commissions that would flow from selling higher face value policies. Compl. ¶ 8; Amend. Compl. at 12; Pl.'s Reply at 13. Furthermore, plaintiff asserts that when she requested a transfer out of the Silver Spring office in 1995, the Agency Vice-President Chang told her that she "had no options," while a male employee was allowed to make a transfer out of Silver Spring that same year. Pl.'s Reply at 6; EEOC Questionnaire ¶¶ 15-22.

Looking at MetLife systemically, plaintiff claims that women have "inordinately low earnings and retention," earning only 25% of what men earn and comprising only 20% of the account representative population. Amend. Compl. At 13-14; Pl.'s Reply at 23-24. Moreover, few managers at MetLife are women, and nearly all of the award-winning employees are men. Pl.'s Reply at 13. Plaintiff also points to the cancellation of the Women's Community Celebration, an event planned by plaintiff to allow account representatives to invite their women clients and prospects to visit MetLife, as further evidence that MetLife discriminates against female account representatives and clients. Amend. Compl. At 14.

Plaintiff also asserts that MetLife's facially neutral compensation policies had "an adverse impact on Plaintiff and women account representatives overall." Pl.'s Reply at 3. Plaintiff bases this claim on two lines of reasoning: 1) that the competitive nature of MetLife's commission-based compensation structure makes it more difficult for women to succeed due to their less competitive socialization (Tr. 228-29), and 2) that while the compensation system is ostensibly

based on an account representatives having "placed" a certain number of applications within a quarter, it is in fact contingent on how quickly applications are processed by the support staff (since only processed and approved applications count toward the validation requirement), leaving room for disparate treatment by the staff in choosing how quickly to process an individual's applications, Pl.'s Reply at 9-10. Plaintiff states that she was told that the processing of applications should take only two to three weeks, while several of her applications took five to six weeks to process, causing her to miss validation requirement deadlines and to fail to validate. Pl.'s Reply at 9. Plaintiff surmises that since men make up 80% of the account representatives at MetLife and seem to be the most successful MetLife employees, other women must have experienced similar delays in processing. Pl.'s Reply at 10.

Plaintiff has also alleged a sexual harassment and a related retaliation claim against MetLife. While plaintiff's hostile work environment claim was dismissed by this Court in April 2000, its relationship to the remaining retaliation claim necessitates a recounting of plaintiff's assertions. She alleges that on one occasion during the Spring of 1995, in the office making evening sales calls, she witnessed a male associate verbally harass and make sexual advances towards female members of the cleaning staff. Compl. ¶ 8; EEOC Questionnaire ¶ 113. As she states, "Mr. Stewart would disrupt the cleaning women while they were at work and force them into conversation which demanded they admit they 'loved' Mr. Stewart." EEOC Questionnaire ¶ 123. Additionally, plaintiff maintains that in August 1995, another male account representative, Munwar Zariwala, sat in the entrance to the office in cotton short with a "full erection of his penis showing through his outfit." Attachment to Complaint ("Attach.") 6b; see Tr. 175.

Plaintiff lodged a written complaint about these two events on December 14, 1995, in a letter to Dr. Krishnamoorthy, which was forwarded to John Butler, Regional Vice President and other MetLife administrators. EEOC Charge ¶¶ 67-71, Attach. 10a, 10b; Smith Aff., Ex. S. Plaintiff also took the opportunity in the letter to complain about how her work was being negatively affected by inappropriate shouting, lost and delayed mail, and the fact that she had not received a laptop computer or a compensation manual. Id.; see Amend. Compl. at 8.

Mr. Butler responded in writing in January 1996 that after a thorough investigation her allegations "were found to be without factual support and lacked merit." EEOC Charge ¶¶ 67-71, Attach. 10a 10b; Smith Aff., Ex.S. Plaintiff wrote back to Mr. Butler on January 20,1997, arguing that because she was excluded from the investigation, she questioned "its thoroughness." EEOC Charge, Attach. 8a; Smith Aff., Ex.V. Regional Administrator Kathy Britton responded to this letter on March 13, 1997, explaining that plaintiff had never been interviewed for the investigation because her "position was felt to have been clearly stated in your December 14th memorandum ..., and the finding were such that there was no factual evidence of your allegations." Smith Aff., Ex.W. Plaintiff states in her complaint that despite repeated requests to MetLife made by herself and her attorneys, she was never provided with a copy of the investigation file so that she would properly respond to MetLife's findings. EEOC Charge ¶ 71, Attach. 8a, 10B; Pl.'s Reply at 14.

Plaintiff contends that as a result of lodging this complaint, she was subjected to retaliatory treatment which ultimately resulted her termination. Compl. ¶ 8. Specifically, plaintiff alleges that the day she filed the complaint with Krishnamoorthy, her car windshield was damaged in the MetLife parking lot. EEOC Charge ¶ 122.

Krishnamoorthy, she asserts, also verbally abused her and repeatedly interrupted her telephone conversations with prospective clients. EEOC Charge ¶¶ 113, 114, 123. When she complained about such treatment, plaintiff maintains that Krishnamoorthy told her that if she was not happy with her job, she should quit. EEOC Charge ¶ 58.

Plaintiff states that she also encountered "excrement on the conference room floor ... [which she] believes was an attempt to intimidate her and cause her to quit. Pl.'s Reply at 6. Other retaliatory actions included the loss and misplacement of plaintiff's mail from potential clients, physical damage to several of her completed insurance policy forms, and a delay in the receipt of her compensation manual. Amend. Compl. At 8. Plaintiff also contends that an application which would have resulted in a sizable commission that she submitted right after she lodged her complaint was inexplicably declined by MetLife. Pl.'s Reply at 14. Moreover, three of plaintiff's applications that were pending in February 1966 were processed too slowly for her to receive commission credit by her quarter's end. Pl.'s Reply at 38. As plaintiff states, "I believe these actions were purposely instigated to get me to resign voluntarily." EEOC Charge ¶ 58.

Such treatment, plaintiff contends, created an environment which made it difficult for her to be successful in her work and meet her validation requirements. Additional unpleasant experiences, such as a burglary at the Silver Spring office and the distribution of a bomb threat procedures manual, made plaintiff feel unsafe at the office and reluctant to work there, further damaging her business prospects. Amend. Compl. at 708; Tr. 198-204. Plaintiff also claims that MetLife directly reduced her income in retaliation for her complaint. As she states, "At year end, immediately following a written complaint to her agency

Manager, Dr. Krishnamoorthy, regarding the difficulties Plaintiff was experiencing in the New Hampshire office, Plaintiff's income began to decline." Pl.'s Reply at 6.

Upon her transfer to the Wheaton office in October 1966, plaintiff claims that her business improved. She would have validated, she contends, but she was prevented from doing so because of further processing delays and defendant's deliberate rejection of some of her applicants in order to prevent her from breaking into a potentially lucrative market controlled by a successful male account representative. Amend. Compl. She would have validated, she contends, but she was prevented from doing so because of further processing delays and defendant's deliberate rejection of some of her applicants in order to prevent her from breaking into a potentially lucrative market controlled by a successful male account representative. Amend. Compl. At 9-10; Pl.'s Reply at 31. Faced with the prospect of not validating, plaintiff submitted a request through her new office manger, Alex Chow, for a "setback" to count the unprocessed business that was pending during the week of the validation deadline. Amend. Comp. At 9. This request was denied. Instead, MetLife offered plaintiff an extension of time to meet her validation requirements, which she accepted. Smith Aff., Ex. P. Plaintiff claims she only accepted this extension because she believed that defendants were still investigating her sexual harassment complaint. Compl. ¶ 8. However, in hindsight, plaintiff contends, she realizes that the extension was not offered in good faith, but rather, "to forestall [her] filing a legal action." Compl. ¶ 8.

Plaintiff regards the closure of the Wheaton office as yet another instance of defendant's efforts to retaliate against her and to thwart her career. As she states, "again, Plaintiff was made to moved [sic] to another office disrupting her work routine and requiring acclimation to a new office

environment." Pl.'s Reply at 17. Plaintiff was transferred to the Rockville office in April 1997. There, plaintiff contends, yet another of her prospective client's insurance application was unjustly denied. Specifically, MetLife denied the policy because they had received information suggesting that the applicant had possible suicidal tendencies. Amend. Compl. At 10-11; Tr. 455053. Plaintiff alleges that the denial of the policy was retaliatory in nature because the applicant never told her about the suicide attempt, the applicant's doctor was never called to confirm the suicide attempt, and the underwriter who denied the loan "yelled at" plaintiff. Tr. 454-55; Amend. Compl. at 10-11; EEOC Charge ¶ 30. Moreover, it was a "loss of a sizeable commission to Plaintiff' and again affected her ability to validate." Amend. Compl. At 11.

All of these instances of discrimination and retaliation, plaintiff contends, combined to make her incapable of doing her job. She failed to validate for two consecutive quarters, and consequently, on November 21, 1997, MetLife terminated her employment. Tr. 650-51; Smith Aff., Ex. H. On April 16, 1998, plaintiff filed charges of discrimination with the Baltimore EEOC. The EEOC issued plaintiff a Right to Sue letter on February 16, 1999. The instant action followed.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party id entitled to judgment as a matter of law." Fed.R.Civ.P.56(c). While the moving part bears the initial

burden of showing that there are "no genuine issues of material fact," once such a showing is made, "the non-movant must 'set forth specifics facts showing that there is a genuine issue for trial." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L Ed. 2d 202 (1986).

In determining whether there are genuine issues of material fact, the court must view the evidence "in the light most favorable" to the non-moving party. Anderson, 477 U.S. at 255. Moreover, when summary judgment is opposed by *pro se* plaintiff, the Court must "read [the *pro se* party's] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." Burke v. Royal Insurance Co., 39 F.Supp.2d 251, 257 (E.D.N.Y. 1999), quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994); *reh'g granted on other grounds*, 914 F.Supp. 1004 (S.D.N.Y.1996); see also Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988) (noting that "special solicitude should be afforded *pro se* litigants generally, when confronted with motions for summary judgment.")

Nevertheless, "conclusory statements, conjecture or speculation by the party resisting the motion will not defeat summary judgment." Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir.1996). Indeed, even a *pro se* plaintiff's "bald assertion, made without evidentiary support ... is not sufficient to overcome a motion for summary judgment." Burke, 39 F. Supp.2d at 257, *quoting* Lee, 902 F. Supp at 429. To defeat a motion for summary judgment, a *pro se* plaintiff, like any other non-moving party, must submit admissible evidence sufficient to support a finding in her favor ..." Fitzgerald v. Henderson, 251 F.3d 345, 361 (2d Cir. 2001); see Fed.R.Civ.P. 56(e). Such evidence can come in the form of "affidavits ... made on personal knowledge" or

"depositions, answer to interrogatories, or further affidavits." Fed.R.Civ.P.56(e). Moreover, Rule 56(e) holds that:

> [when] a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56(e).

In the instant case, plaintiff has largely failed to meet her burden of coming forward with admissible evidence to show there are genuine fact issues for trial. While she has submitted one sworn affidavit from her former prospective clients, Lucy Duff and Robert Woodruff, the two other affidavits she submits are unsworn and thus carry no weight.[01]
Even more significantly, plaintiff has provided no sworn

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[1]The unsworn affidavits are from Jane Kelso, a friend and prospective client of plaintiff's, and Joseph Cappello, whose relationship to the case at bar is unclear. The one sworn affidavit from Lucy Duff and Robert Woodruff speaks largely to their experience applying for a Survivorship Whole Life policy from MetLife, encountering delays in the application's processing and ultimately having the application declined by MetLife. While the affidavit does lend credence to plaintiff's allegations of delayed processing, it is not sufficient, as the sole sworn affidavit by plaintiff, to serve as evidentiary support for all of the allegations in her complaint.

complaint are true."[2] Instead, plaintiff rests her opposition to summary judgment upon further unsworn allegations in her legal memorandum, and on the facts contained in the accompanying twelve documents. As this Circuit has held, however, allegations contained in legal memoranda "are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist." Marks v. Nat'l Communications Ass'n, Inc., 72 F.Supp. 2d 322, 334 (S.D.N.Y. 1999) (quoting SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978)). Furthermore, the twelve attachments to plaintiff's brief[3] provide little, if any,

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[2]Plaintiff was fully informed of these requirements, having been sent the Notice to *Pro Se* Litigant Opposing Motion for Summary Judgment from defendant on April 16, 2001. This notice explicitly states: "In short, Rule 56 provides that you may NOT oppose summary judgment simply by relying upon the allegations in your complaint. Rather, you must submit evidence, such as witness statement or documents, countering the fact[d]s asserted by the defendant and raising issues of fact for trial. Any witness statements, which may include your own statements, must be in the form of affidavits."

[3]The attached documents, which are not identified by affidavit, appear to include; a help wanted ad dated February 7, 1993 from MetLife's Fairfax, VA office; a letter dated April 27, 1994 from MetLife Branch Manager Sanjay Jain explaining that while there are no suitable openings for plaintiff at that time in the Fairfax office, there are opportunities in the Gaithersburg, MD office; an excerpt from MetLife's Compensation policy describing the calculation of the Initial Payment Level; a chart comparing the median earnings of men versus women in selected occupations in 1997 from the U.S. Department of Labor; the MetLife Compensation policy; a chart of the processing times of plaintiff's applications; plaintiff's "Weekly Statement of Commissions and Record of Premiums Remitted"; an excerpt from Defendant's Response to Plaintiff's Interrogatories; plaintiff's weekly pay statements from 3/1/96 to 1/9/98; plaintiff's "Record of Payments Receive Since Last Deposit," dated 1/4/95; a letter dated 2/12/97 from Attorney James Forrest King to plaintiff regarding the Montgomery County HRC Questionnaire, stating "I don't see an need to be proactive with our complaint at this juncture"; the commission and income statements of 13 MetLife employees, both male and female; and a letter from plaintiff to

evidentiary support for the myriad allegations of discriminatory or retaliatory treatment raised by plaintiff's complaint.

The Court therefore finds that plaintiff has failed to meet the requirements of Fed.R.Civ.P.56(e). Summary judgment is appropriate on this ground alone. However, in view of Tunny's status as a *pro se* party, the Court will, for purposes of analysis, consider the assertions of fact in plaintiff's complaints and legal memorandum and evaluate the motion in light of the entire record of submissions before the court.

B. Timeliness and the Continuing Violation Doctrine

It is well-established that a plaintiff bringing suit under Title VII must first file a claim in a timely manner with the EEOC or a state civil rights agency. See Castellano v. City of New York, 142 F.3d 58, 72 (2d Cir.1998). Failure to do so will result in one's claims being dismissed. Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 172 (2d Cir. 1996). The time limit for filing with the EEOC in a state that has a state or local equal employment agency is 300 days from the date of the adverse employment practice. Nat'l R.R. Passenger Corp. V. Morgan, No. 00-1614, 2002 WL 1270268, at *5 (U.S. June 10, 2002). Accordingly, only discriminatory incidents that take place in the 300 days prior to the date of filing are actionable.

Plaintiff filed her discrimination and retaliation charge with the Baltimore, Maryland office of the EEOC on

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MetLife employees, both male and female; and a letter from plaintiff to the Deputy Superintendent of Schools in Prince George's County dated 9/8/94, expressing interest in selling insurance to the teachers in the district.

Court ruled that "absent some exception, all of plaintiff's claims of discrimination based on incidents that occurred prior to June 20, 1997 are time barred." Order at 24. Thus the only discriminatory act alleged by plaintiff that is not time barred is her termination, which occurred on November 21, 1997.

The Court left open the possibility, however, that some of plaintiff's time-barred claims might be considered part of a "continuing violation" or may otherwise be evidence of discriminatory intent. Order at 26. Under the continuing violation doctrine, time-barred claims may still be addressed by the court "where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766 (2d Cir. 1998) (citing Cromwell v. Robinson, 23 F.3d 694, 704 (2d Cir. 1994). While this doctrine has been interpreted by some court to have two prongs–one for ongoing discriminatory policies and practices and another for discrete discriminatory acts outside of the limitations period that are related to the discriminatory acts within the limitations period, the Quinn Court noted that only the former prong was correct. "[M]ultiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." Quinn, 159 F.3d at 765, quoting Lambert v. Genesee Hosp., 10 F.3d 46, 53 (2d Cir.1993). Moreover, as the Supreme Court recently clarified, "We hold that the statute precludes recovery for discrete acts of discrimination or retaliation which occur outside the statutory time period." Morgan, 2002 WL 1270268, at *3. Hence, only the ongoing policy and practice theory of continuing violation, and not the discrete related acts theory, is still

viable. [4]

This Court held in its November 1999 order that "Plaintiff does not allege that the purported acts of sexual harassment or retaliation are the result of an official policy or practice of the defendants," but left open the possibility of a discrete acts continuing violation. Order at 25. However, this line of reasoning is now foreclosed in light of the Supreme Court's opinion in Morgan. Plaintiff, however, argues in her brief that she "has claimed a continuing violation through the existence of *an official policy or mechanism*." Pl.'s Reply at 19 (emphasis added). She points in her brief to MetLife's policies of capping an account representative's IPL at their pre-hire income and the quarter validation requirements as "evidence of policies and procedures through which disparate treatment occurs ... result[ing] in gender discrimination at MetLife. Pl.'s Reply at 19. She also recites the litany of mistreatment detailed above, from "continuous harassment for a lengthy period of time" to the delays in processing her applications, as evidence of MetLife's "policy" of retaliation. Pl.'s Reply at 20.

While it is possible that MetLife's rules capping the IPL at pre-hire income and compelling account representatives to meet quarterly validation requirements could constitute "policies" under a continuing violation theory, plaintiff has not submitted sufficient evidence for a reasonable jury to show that the pre-hire incomes of the women joining MetLife as account representatives are decidedly less than those of the men joining MetLife as

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[4]The Supreme Court preserved the discrete acts theory, however, for claims alleging a hostile work environment. See Morgan, 2002 WL 1270268 at *2. However, this Court dismissed plaintiff's hostile work environment in its order of November 10, 1999. Order at 23.

account representatives, or that women's IPLs at MetLife are as a whole lower than men's.[5] Nor has she offered any evidence tying the quarterly validation requirements to disparate treatment of women and men at MetLife beyond her speculation about women's less competitive socialization. Moreover, the other mistreatment detailed by plaintiff has been held by most courts to constitute "discrete acts" of discrimination, rather than a "policy or practice" of discrimination. As Crosland v. City of New York held, "It is well-settled that ... transfers, demotions, [and] failure to compensate adequately ... are all discrete acts which do not constitute a continuing violation." Crosland v. City of New York, 140 F.Supp.2d 300, 308 (S.D.N.Y.2001). See also Lambert, 10 F.3d at 56 (holding that "multiple instances of discrimination, even similar ones .. do not amount to a continuing violation.") According, I find that plaintiff failed to make out a case for continuing violation.

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[5]Plaintiff has submitted one page of general labor force data showing that women's weekly earnings in different professions are uniformly lower than men's. See Pl.'s Reply, Attachment 3, "Earnings in Selected Occupations 1997," U.S. Department of Labor. However, such general data tells us nothing about the comparative pre-hire salaries of the men and women selected by MetLife to become account representatives, or their resulting IPLs. As Wards Cove Packing Co. has held, in order to prove through statistics that an employer's policy or practice has a disparate impact, a plaintiff must present statistics from the "relevant labor market." Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 650 (1989). In this case, relevant labor market data should at the very least include data regarding the comparative pre-hire incomes of MetLife male and female account representatives and their comparative IPLs. Alternatively, plaintiff could make some showing that the "figures for the general population... accurately reflect the pool of qualified applicants," thus justifying her reliance on the general population statistics to prove her case. See Teamsters v. United States, 431 U.S. 324, 340, n. 20 (1977); Dorthard v. Rawlinson, 433 U.S. 321, 329-330 (1977). Plaintiff has made neither showing, however, in the instant case. Accordingly, we find that plaintiff has failed to make out a continuing violation based upon defendant's policy of capping IPLs at pre-hire incomes.

1. Equitable Doctrines

Although plaintiff does not meet the requirements for a continuing violation, the time bar for some of her claims could still nonetheless be waived under a theory of equitable tolling. See Zipes v. TransWorld Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). While courts have discretion to decide when to apply these doctrines, the general rule is that "they are to be applied sparingly." Morgan, 2002 WL 1270268, at *7. Equitable tolling, for example, is reserved for instances in which "the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," where the plaintiff has received inadequate notice, where the plaintiff has "actively pursued his judicial remedies by filing a defective pleading during the statutory period," or where the court has led the plaintiff to believe that she has done all that was required of her. See Van Zant, 80 F.3d at 713 (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct.453, 112L.Ed.2d 435 (1990)); South v. Saab Cars USA, Inc., 28 F.3d 9, 11-12 (2d Cir.1994).

None of these scenarios, however, matches the facts of the case at bar. Although plaintiff alleges that MetLife granted her an extension to validate in order to prevent her from taking legal action (Compl. ¶8; Pl.'s Reply at 39), plaintiff has submitted no evidence to support this assertion – no proof that MetLife was aware that she was considering a legal claim or that the extension was in any way granted in contemplation that she drop her claim In fact, plaintiff acknowledges in her deposition that before she received her extension, she had already sought legal counsel and had chosen not to file a claim Tr. 546, 549-57. Such situations do not qualify for equitable tolling. See Madera v. Metropolitan Life Insurance, No. 99 CIV. 4005, 2002 WL 1453827, *4

(S.D.N.Y. July 3, 2002) (holding that inequitable tolling is inappropriate where plaintiff, aware of the adverse conduct, delayed filing a complaint hoping defendant-employer "would turn from its discriminatory and retaliatory ways.")

Plaintiff's final attempt to make out an equitable claim is her explanation that she did not file a discrimination charge with the EEOC because she did not realize that she was being retaliated against "until [the 'nebulous acts'] led to her termination. Pl.'s Reply at 18. However, her evidence to support this claim is also equivocal. Indeed, plaintiff states that she sought the advice of an attorney in 1995, but did not file her complaint until 1997, indicating an awareness in 1995 that she might have some grounds for legal action. Id. She also explains that although she was aware in early 1966 that MetLife had closed the investigation into her complaint, she chose not file with the EEOC at that time because she "was being successful at [the] Wheaton [office]." Tr. 540-50.

Courts have rejected similar arguments as a grounds for relief from the time bar. In Van Zant, for instance, the Court rejected plaintiff's argument that since it was unclear how the "events at issue ... would play out, the 300-day time bar should not prevent consideration of those events." Van Zant v. Royal Dutch Airlines, 80 F.3d 708, 713 (2d Cir. 1996). Indeed, as the Court stated, "The timeliness of a discrimination claim is to be measured from the date the claimant had notice of the allegedly discriminatory action." See also Jarmon v. Powell, No. Civ.A. 01-0580, 2002 WL 1431403, at *6 (D.D.C. July 2, 2002) (holding "plaintiff's lack of diligence cannot be excused" where there is evidence that plaintiff was aware an on-going investigation had been completed). Since there is evidence to suggest that plaintiff had notice that she had grounds for legal action as early as 1995 and that she voluntarily delayed filing until November

1997, one year and ten months after she had notice that MetLife's internal investigation had been completed, this Court finds no ground for granting plaintiff a waiver of the time bar. Hence, all claims other than the timely discrimination and retaliation claims based on plaintiff's termination are hereby dismissed.

C. Gender Discrimination

Title VII gender discrimination claims are subject to the burden-shifting analysis spelled out in McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802-04 (1973). Under this analysis, the plaintiff bears the initial burden of establishing a prima facie case that she was the victim of discrimination. Texas Dep't. Of Comm. Affairs v. Burdine, 450 U.S. 248, 252[0]53 (1981). To make out a *prima facie* case, a plaintiff must show by a preponderance of evidence that:

> (1) she is a member of a protected class; (2) she satisfactorily performed the duties of her position; (3) she was subjected to an adverse employment action; and (4) the adverse employment action occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in the class.

Adeniji v. Admin. for Children Servs., NYC, 43 F.Supp. 2d 407, 418-19 (S.D.N.Y. 1999), *aff'd,* 201 F.3d 430 (2d Cir. 1999). Once a plaintiff has made such a showing, the burden of production then shifts to the defendant, who must rebut the *prima facie* case by producing a legitimate reason supported by admissible evidence for his actions. The burden of production is not onerous; as the 2nd Circuit has stated, "[a]ny legitimate, nondiscriminatory reason will rebut the presumption triggered by the *prima facie case*." Fisher v.

Vassar College, 114 F.3d 1332, 1335-36 (2d Cir.1997).

Once the employer has articulated a legitimate, non-discriminatory reason, the plaintiff must show that the reason proffered by the employer is in fact a pretext for discrimination in order to prevail. Indeed, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's Honor Ctr. v. Hicks, 509, U.S. 502, 507 (1993).

Here, the defendant does not contest plaintiff's claim that she has established a *prima facie* case of gender discrimination in her discharge. Instead, defendant moves directly to proffering a legitimate non-discriminatory reason for plaintiff's termination – namely, that plaintiff was discharged for failing to meet "the stated minimum validation requirements in two successive quarters." Def's. Memo at 17. Defendant points out that plaintiff conceded both in her responses to their Requests for Admission and in her deposition testimony that her termination was due to her failure to validate. Def.'s Memo at 18-19; See Smith Aff., Ex H.

At this point in the analysis, the burden reverts to the plaintiff to show that this proffered reason is false and that "more likely than not the employee's [gender] was the reason for [the adverse decision]." Hold v. KMI-Continental, Inc., 95 F.3d 123, 129 (2d Cir.1996), *cert. denied*, 117 S.Ct. 1819 (1997). This Court finds that plaintiff has failed to meet her burden.

While plaintiff charges in her brief that "MetLife's reason for Plaintiff's termination is a pretext for discrimination" (Pl.'s Reply at 3), she provides no evidence to support this allegation. Furthermore, she offers no

evidence to suggest that those who had a hand in terminating her – her manager, Peter Bjerke, and the Regional Vice President, John Butler – ever displayed any kind of gender animus toward her. Butler, on the contrary, agreed to grant plaintiff an extension of time to validate, thus forestalling an imminent termination and effectively granting plaintiff a second chance to remain employed at MetLife. As several courts have held, evidence of such positive treatment by an employer tends to undercut an inference of discriminatory motive in their ultimate termination. See Rodriguez v. Am. Friends of Hebrew Univ., Inc., 96 Civ. 0240, 2000 WL 1877061 at *5 (S.D.N.Y. Dec. 26, 2000) ("As the Second Circuit has noted, it is difficult to impute bias against plaintiff's protected class(es) where the person who made the adverse employment decision also made a favorable employment decision regarding plaintiff."); Littman v. Firestone Tire & Rubber Co., 709 F.Supp. 461 (S.D.N.Y. 1989).[6] Plaintiff also fails to point to any similarly-situated

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[6]Plaintiff does not attempt to claim that the extension which she requested and which was granted by Butler was in fact "a pretext to mask retaliation and gender discrimination on the pat of MetLife" (Pl.'s Reply at 28), but the evidence she points to in support of this charge, namely that MetLife did not grant her the requested setback of her unprocessed businesses and that her income declined as a result–does not support this conclusion. Plaintiff points to nothing in MetLife's Compensation policies that supports her argument that compensation setbacks ought to have been granted to some one in her situation – indeed, there is no mention of "compensation setbacks" anywhere in the policies. Moreover, the decline in plaintiff's income occurred just as the letter from Butler granting her extension stated it would. Letter from John Butler, December 16, 1966, Smith Aff., Ex. P ("If any of the cumulative financing limits would be exceeded by a weekly payment, then the payment must be

individuals – namely, male account representatives who failed to validate for two consecutive quarters and were not discharged.

Instead, plaintiff seems to rest her charge of discriminatory motive on a variety of pretermination experiences that she attributes to her gender as well as her claim of systemic gender discrimination in MetLife's practices and policies. While this Court has held above that plaintiff's pre-termination treatment is not actionable as an independent claim due to the time bar, the evidence of such treatment may still be probative of gender animus in the decision to terminate her. Plaintiff, however, fails to point to any such admissible evidence that would support an inference of discrimination.

Plaintiff's evidence of pre-termination gender animus includes her claims that: 1) her hiring was intentionally delayed a year so that MetLife could pay her a lower IPL, thus forcing her to start with a "an initial income lower than that of male account representatives" and reducing "the expectations of MetLife's management regarding her earnings and career potential" (Pl.'s Reply at 4), 2) she was told by MetLife advisor to write lower face amounts for female clients' policies (Tr. 34-55, 607), 3) her request for a transfer out of the Silver Spring office was denied while the request of a male was granted (Pl. Memo at 6), 4) her business was processed at a slower rate than other male account representatives (Compl. ¶ 8), 5) she was berated by her manager and an underwriter (Amend. Compl. at 8), and 6) several of her clients' policies were rejected, both because of her gender and that of her female clients (Tr. 450;

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limit." Hence, plaintiff, has not presented any evidence to persuade the Court that the extension was in any way granted in bad faith.

6) several of her clients' policies were rejected, both because of her gender and that of her female clients (Tr. 450; Amend.Compl. at 11; Pl.'s Reply at 9).

However, plaintiff's support for all of these claims, not to mention their probative value in showing gender animus by MetLife, is equivocal at best. Indeed, her only evidence to suggest that MetLife intentionally delayed hiring her for one year so that it could bring her in at a lower IPL is her own speculation that since MetLife was advertising for a position the first year she applied, they must have been disingenuous when they told her that there were "no suitable openings" for her that year. Pl.'s Reply at 4. However, such speculation into MetLife's motives has very little probative weight–indeed, MetLife could have had innumerable other reasons why they did not hire plaintiff that year. Plaintiff offers nothing to show that MetLife had any knowledge of her changed income position between the time it denied her the Fairfax position and the time it offered her the Gaithersburg position, or that her decrease in income was the reason they decided to make her the Gaithersburg offer. Moreover, plaintiff has not shown that her initial income was necessarily lower than all of the male account representatives at MetLife. Hence, this entire first claim provides little if any evidence of gender animus by MetLife.

Plaintiff's claim that she was told to write lower face amounts for her female clients is similarly flawed. In short, it is not clear that any suggestion of that nature was ever made to plaintiff, or if made, that the suggestion in any way had a discriminatory intent. In fact, plaintiff acknowledges that the person who made the suggestion, someone whom plaintiff has trouble identifying with certainty, simply suggested that she writer lower face amounts so as to reduce the risk in her business. Tr. 33-34. As she states, "I assumed that it was to reduce the risk if there were lapses, the risk to me. That was

was directed at plaintiff's female clients. Hence, the deposition testimony is illustrative:

> Q: Did he specifically say women or was that your conclusion based on the fact that you mostly wrote for women?
> A: We were talking about my clients, my market, as being primarily women so I assumed if he was talking about my market and my client base that he meant women.
> Q: He didn't actually say women?
> A: I don't recall, I really don't.
> Q: He could have been speaking about any of your clients?
> A: He may have been.
> Q: Including males?
> A: Right, but at that time I only had maybe one male. (TR. 35-36)

As this testimony reveals, plaintiff cannot state conclusively that in making this suggestion, defendant was either motivated by a desire to harm her or by a desire to cap the insurance policies of women specifically. Hence, this evidence also fails to support an inference of gender discrimination.

Plaintiff's third cited experience–being denied a transfer out of the Silver Spring office while her male colleague, Alan Reid, was granted a transfer–also fails to lend support to any inference of discrimination. As defendant points out, Mr. Reid was the Silver Spring office manager while plaintiff was simply an account representative; therefore, the two parties are not similarly situated and thus not suitable for comparison. Moreover, the denial of a single transfer to a female employee and the grant of a transfer to one male employee in a different position is

denial of a single transfer to a female employee and the grant of a transfer to one male employee in a different position is hardly probative of gender discrimination.

Plaintiff's next claim, that her applications were processed at a slower speed than those of male account representatives, is also weak. Plaintiff relies on the hearsay statements of two MetLife employees, Eileen McCullough and Samuel Pastor, to support the contention that processing time should average two to three weeks, but does not supply any affidavits from these individuals to confirm these statements. Furthermore, plaintiff's contention that "her business averaged five to six weeks to process" is not borne out by the data that she supplies. Pl.'s Memo, Attachment 5. Indeed, while it appears that approximately 40% of her applications took more than 3 weeks to process, the majority–a full 60% of her applications–were processed in under 3 weeks. Lastly, plaintiff concedes in her deposition testimony that processing speed was most likely based on productivity levels and experience, not gender. Tr. 51-52, 428. All of these factors point away from an inference of discrimination.

Plaintiff's final two claims, that she was berated by her supervisor Krishnamoorthy and an underwriter, and that some of her policies were unjustly rejected, also fail to provide much probative weight. Regarding her ill-treatment by Krishnamoorthy, plaintiff admits that male representatives received the same treatment and that in fact, Krishnamoorthy "seemed to be more at ease with the women." Tr. 151-52. Her experience of being yelled at by one underwriter reveals no clear link to gender animus. Finally, plaintiff admits that her applications that were rejected due to MetLife's various approval policies, not "for no justifiable reason" as she states in her memorandum. Tr. 445, 454; Pl's Memo at 13. Furthermore, plaintiff acknowledges that in one case of which she complains, she improperly submitted an

454-55.

Plaintiff's claim of systemic disparate treatment at MetLife fares no better. A systemic disparate treatment claim requires that a plaintiff prove by a preponderance of the evidence "more than the mere occurrence of isolated or 'accidental" or sporadic discriminatory acts"; indeed, a plaintiff must show that "discrimination was the company's standard operating procedure the regular rather than the unusual practice." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977). To make out a pattern or practice claim, a plaintiff must typically introduce evidence of "statistical disparities," see Hazelwood School Dist. v. United States, 433 U.S. 299, 307-308 (1977). Moreover, when statistics are introduced in a pattern or practice case, "plaintiffs typically use multiple regression analysis to isolate the influence of gender on employment decisions relating to a particular job or job benefit, such as salary." Ottaviani v. State Univ. of New York at New Paltz, 875 F.2d 365, 366 (2d Cir.1989); see Sobel v. Yeshiva Univ., 839 F.2d 18, 21-22 (2d Cir.1988); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 324-25 & n. 22 (7th Cir.1988); Palmer v. Schultz, 815 F.2d 84, 90-91 (D.C.Cir.1987). Such regression analyses help the Court determine whether the apparent disparities between the groups are truly the product of discrimination, some other factor or chance. Indeed, as Ottaviani cautions, "Not all disparities, however, are probative of discrimination. Before a deviation from a predicted outcome can be considered probative, the deviation must be 'statistically significant.'" Ottaviani, 875 F.2d at 370.

In the instant case, plaintiff's evidence of a pattern of discrimination by MetLife is simply insufficient for a reasonable jury to infer discrimination. While she argues that female account representatives at MetLife have lower

reasonable jury to infer discrimination. While she argues that female account representatives at MetLife have lower earnings and retention than males, which she also claims is reflected in the fact that few managers and award winners in the company are women, she offers only her own self-styled statistical analysis of earnings statements as support. Pl.'s Memo, Attachment 11. This analysis largely turns on her calculation that the earnings of the highest male representatives "are 400% the earnings of women." Pl.'s Memo 25.

Plaintiff's own statistical calculations, however, are questionable at best. Her "400%" figure is derived from a comparison of the annual earnings of the highest earnings male from January 1995 to January 1998 ($195,543.36) to the annual earnings of the highest earning female from the same period ($55,389.37). Pl.'s memo at 23. While the earnings of the highest earning male earner could reasonably be called approximately 3.5 times (or arguably 350%) those of the highest female earner, to extrapolate from that figure to say that the earnings of all male account representatives are 400% those of all female account representatives is clearly spurious. Moreover, these calculations tell us nothing about statistical significance of the disparity or the range of other variables that might contribute to the observed disparity, such as hours worked, "prior experience, years of service, volume of business, value of policies sold an the like." Def's Reply at 9. Plaintiff's comparative analysis of male-female retention rates is similarly spotty.

Plaintiff's final evidence of gender discrimination in her termination decision is her claim that MetLife's compensation and validation policies, while facially neutral, in fact have a disparate impact on female agents, leading disproportionately to their termination. See Smith Aff., Ex H; Pl.'s Reply at 11. This disparate impact charge is leveled

women since women in the general labor market have lower salaries on average than men (Tr. 650; Compl. ¶8; 3, 11, 28), and 2) MetLife's commission-based validation requirement, which as detailed above, plaintiff claims has a disparate impact due to women's "less competitive socialization" and the differential processing speeds of men's and women's applications.

It is well-settled that to make out a *prima facie* case of disparate impact, a plaintiff must either show that the identified employment practice creates "a gross statistical disparity, or a statistically significant adverse impact coupled with other evidence of discrimination." Victory v. Hewlett Packard Co., 34 F.Supp.2d 809, 822 (E.D.N.Y. 1999), quoting Waisome v. Port Authority of New York and New Jersey, 948 F.2d 1370, 1375 (2d Cir.1991). If a plaintiff has established a *prima facie* case, the burden then shifts to the employer to demonstrate that the employment practice is job-related and consistent with business necessity. However, if the defendant can show by pointing out flaws in the plaintiff's statistics that the practice in question does not cause a disparate impact, the business necessity inquiry becomes moot. See Wards Cove, 490 U.S. at 660-61; Victory, 34 F.Supp.2d at 822.

In the instant case, plaintiff's evidence of disparate impact created by the two identified policies in insufficient to raise a triable issue of fact. Regarding the pre-hire IPL cap, plaintiff's general labor force statistics showing lower average earnings for women are legally insufficient to demonstrate a disparate impact from MetLife's employment practices. As this Circuit has held, a proper disparate impact analysis requires analysis of the relevant labor market in question. See Smith v. Xerox Corp., 195 F.3d 358, 368. In this case, such an analysis would require, at the very least, an examination of the pre-hire incomes of the men and women

this case, such an analysis would require, at the very least, an examination of the pre-hire incomes of the men and women applying to become account representatives at MetLife in the Maryland-Virginia region, as well as an analysis of their resulting IPLs. Plaintiff has provided no evidence to support such an analysis.

Plaintiff's disparate impact claim against MetLife's commission-based compensation system is even more questionable. To begin, plaintiff provides no evidence that fewer women than men meet their validation requirements and are thus terminated more frequently as a result. While she states that she has only been able to identify "one female account representative who successfully completed her initial training period at MetLife during Plaintiff's employ" and no female account representatives who "retired from MetLife as an account representative" (Pl.'s Memo at 24), she provides no support for these claims and no evidence linking this alleged dearth of women to the commission structure or validation requirement. As with her systemic disparate treatment argument, this analysis fails to control for the many other possible variables leading to any observable disparity. Furthermore, plaintiff acknowledges in her deposition that the only reason she believes MetLife's compensation policy adversely affects women is because "the competitive nature of it is something that's not part of women's socialization." Tr. 228-29. Such conclusory statements and subjective opinions do not constitute evidence to support a claim of discrimination. Lastly, her claim that the applications of female account representatives are processed more slowly than those of males is wholly unsupported. Accordingly, this Court finds that plaintiff has failed to make out a claim of disparate impact in MetLife's policies and practices.

In sum, "[t]he record is replete with [plaintiff's] conclusory statements and subjective feelings – not facts – in

... 'devoid of specifics, but replete with conclusions' ... cannot withstand a properly supported motion for summary judgment.") (internal citation omitted). This Court finds that plaintiff has not produced sufficient evidence for a reasonable jury to find that defendant's proffered reasons for terminating plaintiff were a pretext for discrimination. See Richardson v. New York State Dep't of Corr. Serv., 180 F.3d 426, 439 (2d Cir. 1999); Erlach v. New York City Board of Education, No. CV 94 4239, 1996 WL 705282, at *7 (E.D.N.Y. Nov. 26, 1996) (Dearie, J.) (holding that unpleasant and difficult working conditions, absent evidence that they were motivated by discrimination, are insufficient to satisfy summary judgment). Accordingly, defendant's motion for summary judgment with respect to plaintiff's gender discrimination claim is granted.

D. Retaliation

We now turn to an analysis of plaintiff's claim that her termination in November 1997 was in retaliation for the sexual harassment claim she brought in December 1995. Claims of retaliation brought under Title VII are also subject to the three-step burden-shifting analysis spelled out above. "In order to establish a *prima facie* case of retaliation, a plaintiff must show by a preponderance of the evidence (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action." Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). Once the *prima facie* case is established, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment action. Then the burden reverts to the plaintiff to prove that the proffered reason is a pretext for the defendant's retaliation.

retaliation.

Plaintiff satisfied the first prong of this claim because at least several managers and supervisors were aware that she filed a sexual harassment complaint with her manager, Dr. Krishnamoorthy. Tr. 140-41; Attach. 6b, 10a. Moreover, whether or not she was justified in filing this complaint is immaterial; plaintiff "need only demonstrate that she had a 'good faith, reasonable belief that the underlying challenged actions of the employer violate the law." Quinn, 159 F.3d at 769 (citing Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988)).

Plaintiff also fulfills the second prong because her November 21, 1997 termination qualifies as an adverse employment action. Plaintiff also alleges that each of her untimely processed applications, denied applications, declines in her compensation, and general "office impediment[s]" constituted adverse employment actions. Pl.'s reply at 38; Tr. 138, 140. While the Court cannot consider whether these time-barred adverse employment actions were themselves retaliatory, it may consider such allegations as "relevant background evidence" to determine whether her timely-filed retaliatory termination claim is legitimate. Morgan, 2002 WL 1270268, at *6 (citing United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 52L.Ed. 2d 571 (1977)).

The crux of this claim lies in the third prong: whether plaintiff can show a causal connection between her sexual harassment complaints and her ultimate termination. A plaintiff can establish a causal connection by: "(a) showing that engaging in the protected activity was followed closely in time by the adverse employment action; (2) submitting evidence that other employees who engaged in conduct similar to the [p]laintiff were treated unfairly, or (3)

223, 229 (E.D.N.Y. 2001). Defendant disputes that any such causal connection exists. See Def.'s Memo at 28-29.

Plaintiff was not terminated until November 1997, nearly two years after she initially filed her complaint of harassment with the Silver Spring office. Between those two events, plaintiff transferred offices three times (Smith Aff., Ex.H), worked under a variety of supervisor (Tr. 363-64; Tr. 671-72), experienced increased compensation, validated several times (Tr. 549), and was granted a validation extension. The length of time and these numerous intervening events all seem to weigh against a finding of causal connection. See Van Zant, 80 F.3d at 711-12.

Furthermore, plaintiff has failed to provide any evidence of women who experienced similar retaliatory treatment by MetLife. Plaintiff does not identify any women who have lodged sexual harassment complaints at MetLife, much less anyone who has experienced retaliatory treatment as a result of filing such a complaint. Plaintiff thus fails to establish a causal connection through this avenue.

To the third method of proving a causal connection, plaintiff has alleged a laundry list of workplace difficulties, all of which she cites as evidence of retaliatory animus. These difficulties include lost, mail, an office burglary and bomb threat, damage to her car, damaged insurance policies, excrement in the office, the lack of availability of a personal laptop computer, disruptive and rude management, delayed processing of her business and rejected applications. In her deposition testimony, however, plaintiff admits that many of these actions were the results of accidents, office personnel carelessness and oversight, and general administrative inconvenience rather than retaliatory animus. See Tr.133-34; 196-204; 255-266; 387-96; 399-401. Moreover, as courts in this Circuit have held, such mishaps in the absence of

196-204; 255-266; 387-96; 399-401. Moreover, as courts in this Circuit have held, such mishaps in the absence of additional evidence tying the treatment to a retaliatory motive, does not even meet the *prima facie* case's de *minimus* retaliatory treatment threshold. See Dortz v. City of New York, 904 F.Supp. 127, 158 (S.D.N.Y. 1995) (holding that delays by a personnel department absent additional evidence that it was related to a retaliatory adverse action are "far too speculative to satisfy even a *de minimus* showing," especially where there is no evidence to show that the employees responsible for delays were even aware of plaintiff's sexual harassment complaint.)

In addition, several of the incidents that plaintiff identifies occurred *prior* to the filing of her sexual harassment complaint with her manager (e.g. the shouting in the office her inability to purchase a laptop, her misplaced mail from potential clients, and the delay in giving her a compensation manual, all of which are referenced in her December 14th letter of complaint). For all of the other claims, plaintiff provides no clear link – not even a stray comment – tying these events to any retaliatory animus on the part of the defendant. Plaintiff has thus failed to establish a *prima facie* case of retaliation.

Assuming *arguendo*, however, that plaintiff has established a *prima facie* case, plaintiff still fails to meet her burden of proving that the reason offered by the defendant for her termination is not only pretextual, but that more likely than not, her termination was in retaliation for her complaint of sexual harassment. As stated in the section above, plaintiff furnishes the Court with no evidence that defendant's purported reason for her termination was false. Accordingly, the Court finds that plaintiff has failed to establish a claim of retaliatory termination under Title VII. Summary judgment for defendant on this claim is granted.

For the foregoing reasons, defendant's motion for summary judgment is granted on all claims. The Clerk of the Court is directed to close the case.

SO ORDERED.

Brooklyn, New York
March 25, 2003

/s/ Raymond J. Dearie
United States District Judge

APPENDIX D

Appendix to Appeal Brief for Plaintiff Appellant
TABLE OF CONTENTS
and INDEX

List of Attachments from Plaintiff's Answer to Defendant's Motion for Summary Judgment

ATTACHMENT 1 - *The Washington Post*, February 7, 1993, page K12, offered an initial income of $41,600, comparable to what Plaintiff was earning at the time. The delay in hiring plaintiff justified lower income and shows gender discrimination at MetLife.....A-I

ATTACHMENT 2 - Defendant's Second Set of Supplemental Responses to Plaintiff's First Set of Interrogatories, Response to Interrogatory No. 18, identifies the factors determining the first year initial payment level (IPL) of account representatives – Excerpt from Manual of Instruction for Regional Sales Offices, Instruction 27A, and excerpt from Recruiting and Selection Manual, Docs. ML 0206-0208. ML 0207 states: "Since the payment recommended after considering these factors should not exceed the individual's prior income ...".and shows gender discrimination at MetLife.....A-II

ATTACHMENT 3 - Anderson, Margaret L., *Thinking About Women, Sociological Perspectives on Sex and Gender Gender,* Fifth Ed, USA, Allyn & Bacon: 1999, p.111 Table 5.1 Earnings In Selected Occupations: 1997, shows lower income for women in all occupations and is evidence that the IPL policy is gender discrimination at MetLife.....A-III

ATTACHMENT 4 - "Compensation Payable to Account Representatives Appointed August 1, 1994 and later under the Financing Plan" whereby account representatives must meet quarterly "production" requirements to maintain their employment. This policy requires that production must be fully "processed" and credited to be counted. When combined with evidence of longer processing times for plaintiff the procedure shows retaliation and systemic gender discrimination.....A-IV

ATTACHMENT 5 - Defendant's Supplemental Responses to Plaintiff's First Set of Interrogatories, Response to Interrogatory No. 15 to identify the processing time for Plaintiff's written business, ML 0202-0205, gives the dates the policy application was signed and the date the policy issued, shows that the processing time was longer than average and is evidence of the adverse handling of Plaintiff's written business.....A-V

ATTACHMENT 6 - Weekly Statement of Commission and Record of Premiums Remitted, (ML 0166 – 0167) commission placings delayed just one week resulted in plaintiff's failing to validate and being subject to termination.....A-VI

ATTACHMENT 7 - Defendant's Responses and Objections to Plaintiff's First Set of Interrogatories, Response to Interrogatory No. 3 to identify the account representatives employed at the time of Plaintiff's employment and in the offices in which she was employed show the disparity in male and female hires and retention and is evidence of gender discrimination.....A-VII

ATTACHMENT 8 - Pay Statements for Agent 020, Joan Tunny, January 1996 – October 1997 show a continuous decline in income and are evidence of retaliation.....A-VIII

ATTACHMENT 9 - Record of Payments Received, January 4, 1996, showing premium deposits for Lana Krawczel and John Mills, evidence of an applicant that MetLife could not locate who was unfairly declined for reasons of discrimination and retaliation .....A-IX

ATTACHMENT 10 - Letter to Plaintiff from James Forrest King, Attorney at Law, dated February 12, 1997, the first attorney that plaintiff sought advice from regarding the sexual harassment.....A-X

ATTACHMENT 11 - Page 23 of Plaintiff's Answer to Defendant's Motion for Summary Judgment summarizing Attachment 11, Defendant's Supplemental Responses to Plaintiff's First Set of Interrogatories, Response to Interrogatory No. 7 that provides the commission earnings of the account representatives identified in Interrogatory No. 3, ML 0352-0361, ML 0601-0604, ML0412-0420, ML0581-0585, ML0440-0449, ML0313-0325, ML0425-0434, ML0510-0513, ML0552-0555, ML0586-0590, ML0556-0561 ML0240-0250, ML 0612 – 0632 and ML 0379 – 0388 and showing a 350% disparity between male and female account representatives, an inordinately high disparity for occupations in the United States, and evidence of systemic gender discrimination at MetLife.....A-XI

List of Attachments to Questionnaire submitted to the EEOC on January 16, 19978

ATTACHMENT 2B - Letter from plaintiff, dated February 28, 1995, to Tai C.Chang, Agency Vice President, questioning non-inclusion of written business in her reported production and other concerns.....A-XII

LIST OF ATTACHMENT FROM Memorandum of Law in Opposition to Defendant's Motion to Dismiss

ATTACHMENT 1 - Compensation Manual for Account Representatives, Commission Setbacks and Other Adjustments, p. 6-9 and memos dated December 24, 1996 and December 27, 1996 documenting plaintiff's request for commission setbacks that were not granted and that shows retaliation against plaintiff.....A-XIII

AFFIDAVITS.....A-XIV

Sworn affidavit of Joseph Cappello.....A-XIV(a)

Sworn affidavit of Joan Tunny.....A-XIV (b)

Sworn Affidavit of Lana Krawcel.....A-XIV (c)

Affidavit of Jane Kelso.....A-XIV (d)

Sworn affidavit of Lucy Duff and Woodruff.....A-XIV (e)

Sworn Affidavit of Susan Breon.....A-XIV (f)[1]

Sworn Affidavit of Shirley Chapin.....A-XIV (g)

Plaintiff's Notice Of Appeal, Motion for Extension of Time, U.S. Court of Appeals Orders.....A-XV

Plaintiff's Application for Appointment of Counsel, June 20, 2000, With Answer to Questions Regarding Ability to Pay and Affidavit of Joan Tunny.....A-XVI

Plaintiff's Letter to U.S.D.C. June 20, 2000 reporting change of address and reporting loss of court papers along with her personal belongings by Amerivanline Movers.....X-VII

Plaintiff's April 13, 2004 facsimile to Mindy Farber and Mindy Farber's April 20, 2004 letter to Neil Abramson regarding settling this Action.....A-XVIII

[1] This affidavit was not received in time to submit.

APPENDIX E

TERMINATION LETTERS
(1) Letter from Defendant to Plaintiff Granting an Extension of Validation (Undated)
(2) Termination Letter from Defendant to Plaintiff

901 Dulaney Valley Road, Suite 500, Towson, MD 21286
Tel 410 339-3465 Fax 410 339-3855

John J. Butler
Regional Vice President
Service from 1968
Registered Representative
Member, N.A.L.U.

(1) Re: Extension of Validation
Ms. Joan Tunny
Account Representative
Elite, MD

Dear Ms. Tunny:

Please be advised that the request for an extension of your validation submitted by your General Manager has been approved.

MetLife's financing plan must conform with the regulations set forth by the New York Insurance Department (NYID). This includes a requirement that each representative stay within cumulative financing limits during each contract year on the financing plan. Since you are in your second year, the maximum amount of cumulative financing is $32,000. At the end of your seventh FPQ, it is estimated that the amount of cumulative financing paid to you will be no more than $19,135.

Financing is defined as the difference between the total payments paid to the financed AR at a point in time and the amount this AR would have been paid as a non-financed AR. If any of the cumulative financing limits would be exceeded by a weekly payment, then the payment must be adjusted downward so that the financing does not exceed the limit.

You have not reached your maximum financing point, but if a future payment would cause the financing limit to be exceeded, payments to you may have to be reduced to stay within regulations. We just wanted to alert you, in advance, that if the maximum amount of financing is reached before the end of your second year, and for each continuing week that this condition exists your weekly IPL and any QIC payment may have to be adjusted downward. The adjustment will be based on the amount you would have received for the week as a non-financed AR.

For example, let's assume you have already reached the maximum amount of financing allowed and you are scheduled for $500 WPL. Let's also assume that the amount of non-financed AR compensation for the same week is $275. Your pay for the week would be $275 because paying more would cause the annual financing limit to be exceeded. If your compensation is adjusted in this matter, you will be informed.

You can take steps to avoid reaching the contract year financing limit and the resulting compensation reduction by increasing your non-financed AR compensation. The way to do this is to increase you First Year Commission (FYC) Production to your moving average account, since moving average account withdrawals are a key element in non-financed AR compensation. If you have any questions concerning this, please contact your manager.

Sincerely,

/s/ John J. Butler
(2)
Ms. Joan Tunn[e]y
Account Representative
A66 American, MD

Dear Ms. Tunney:

Your termination of your employment with this Company is acknowledged and accepted effective November 21, 1997.

As of the effective date of the termination of your employment with Metropolitan Life Insurance Company, you are no longer authorized to accepted premiums or transact business of any description for or on behalf of Metropolitan Life Insurance Company or Metropolitan Property and Casualty Insurance Company or any of their subsidiaries or affiliates.

Your interest in commissions will cease as described in Clause 321 of the Compensation Rules and Schedules Manual, Form 1C. If you have completed 12 fiscal periods, an Adjustment of Account following termination will be completed in accordance with the terms of your appointment as outlined in Schedule IX of the Compensation Rules and Schedules Manual, Form IC.

We remind you that when you were appointed, you signed an Agreement, Form 16449. In executing this Agreement, you have accepted certain restrictions on your activities over the next 18 months and have undertaken certain obligations if you continue to engage in the business of insurance during that period. Metropolitan expects you to honor your obligations under the Agreement and is prepared to take whatever steps it deems necessary to protect its interests as set forth therein.

The attached Forms I&R318 an I&R379 outline the provisions regarding termination of coverage, you right of conversion and the option to continue your group medical insurance and dental coverage under the Company's Insurance and Retirement Program.

Yours truly,
/s/ John J. Butler

Regional Vice President
Midlantic Bay Region

December 4, 1997